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for Appellee.

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OCTOBER TERM, 1899.

No. 135.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY ET AL.,
APPELLANTS,

v.

THE INTERSTATE COMMERCE COMMISSION,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

JAMES E. BOYD,
Assistant Attorney General, and
L. A. SHEVLIN,
For Appellee.

CONTENTS.

	Page.
1. ALL THE ROADS AND LINES RESPONSIBLE FOR THE DISCRIMINATIONS IN FAVOR OF NASHVILLE ARE BEFORE THE COURT IN THIS CASE AS PARTIES DEFENDANT	5, 6
(*a*) The trunk lines from the eastern seaboard to Cincinnati are parties defendant	5
(*b*) The Cincinnati, New Orleans and Texas Pacific road, extending from Cincinnati to Chattanooga, is a party defendant	6
(*c*) The Louisville and Nashville Railroad, extending from Cincinnati to Nashville, is a party defendant	6
(*d*) Hence the lines via Cincinnati to both Chattanooga and Nashville, as well as the lines through Chattanooga, are covered by the order of the Commission	5, 6
2. THE LOUISVILLE AND NASHVILLE ROAD DID NOT APPEAR AND BECOME A PARTY UNTIL THE CASE HAD BEEN COMMENCED IN THE CIRCUIT COURT	7
(*a*) It filed its answer in court May 6, 1893, and was made a party by order of the court July 26, 1893	6
3. When the Commission held that the "defendant lines" were not responsible for the low rates by the line via Cincinnati to Nashville, *the Louisville and Nashville road was not then a defendant*	7

Page

4. The fact, if it be a fact, that the Louisville and Nashville road, by maintaining low rates to Nashville, may deprive Chattanooga of any benefit under the order, *is no ground for declaring the order unlawful* 8

(*a*) It is to be presumed that the natural and proper course of reducing rates to Chattanooga will be adopted by the roads terminating at Chattanooga 9

(*b*) It is to the interest of both the Louisville and Nashville road, and the Nashville, Chattanooga and St. Louis road, that the order be complied with by reducing the Chattanooga rates to the level of the Nashville rates..... 9

(*c*) If the roads *terminating at Chattanooga* reduce their Chattanooga rates to the level of the Nashville rates, those rates will be higher than those roads now receive on Nashville traffic, because they will receive the whole of the Nashville rate, whereas they now receive only a proportion of that rate on Nashville traffic 10

(*d*) *If the Louisville and Nashville road should continue low rates from Cincinnati to Nashville, it would violate section 3 of the law, if it also maintained higher rates to Chattanooga than to Nashville by the line it controls via Augusta and Atlanta to Chattanooga* 9

5. THE THIRD SECTION OF THE ACT APPLIES IF THE FOURTH DOES NOT..... 12

(*a*) The Louisville and Nashville road and the line which it controls from Nashville through Chattanooga and Atlanta to Augusta are responsible under section 3, if not strictly so under section 4 ..... 12, 13

Page.

6. The order will afford relief under section 3 as well as under section 4 13

(a) The court is not restricted to a consideration merely of the power of the Commission "TO MAKE THE PARTICULAR ORDER IN QUESTION," but its duty is "to do justice as a court of equity on the entire body of the evidence before it" 13, 14

7. Compliance with the order does not require an advance of the Nashville rates or a reduction of the Chattanooga rates *to the full extent of the entire difference* between those rates, but it may be complied with by a simultaneous advance and reduction in certain proportions of that difference 15

8. THE PLEA OF RIVER COMPETITION ABANDONED. 16

(a) Defense now based on right and duty of Louisville and Nashville road to protect Nashville in territory to the north and west of her 16, 17

(b) It is equally the duty of the Cincinnati, New Orleans and Texas Pacific road to protect Chattanooga in territory to the northwest of her. 17

9. Motive for discrimination in favor of Nashville 18

I.

THE TRUNK LINES TO CINCINNATI ARE PARTIES DEFENDANT IN THIS CASE.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC ROAD, EXTENDING FROM CINCINNATI TO CHATTANOOGA, IS A PARTY DEFENDANT.

THE LOUISVILLE AND NASHVILLE RAILROAD, EXTENDING FROM CINCINNATI TO NASHVILLE, IS A PARTY DEFENDANT.

HENCE THE LINES VIA CINCINNATI TO CHATTANOOGA AND VIA CINCINNATI TO NASHVILLE ARE INVOLVED, AND ARE COVERED BY THE ORDER OF THE COMMISSION AS WELL THE LINES THROUGH CHATTANOOGA.

The roads composing the trunk lines from the Eastern seaboard to Cincinnati are parties defendant in this case, to wit: The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad Company, The New York and New England Railroad Company, and The Delaware and Hudson Canal Company.

(*See Transcript of Record, p. 1.*)

The Cincinnati, New Orleans and Texas Pacific Railway Company, which extends from Cincinnati to Chattanooga, is a party defendant.

The Louisville and Nashville road became a party defendant *after the case had passed out of the hands of the Commission and was pending in the circuit court.* It filed its answer in the circuit court May 6, 1893.

(*See Transcript of Record, p. 87.*)

Hence the line from the eastern seaboard both via Cincinnati to Chattanooga and via Cincinnati to Nashville are involved in, and subject to, the order of the Commission in this case as well as the lines through Chattanooga.

The name of the Louisville and Nashville road does not appear in the proceedings before the Commission, and does not appear in the proceedings before the court until it came in voluntarily and filed its answer as above stated. By doing so it became subject to the order of the Commission and the decrees of the courts.

After it had filed its answer May 6, 1893, it was subsequently by order of the court on, to wit, July 26, 1893, formally made a party by the order of the circuit court.

(*See transcript of Record, pp. 104, 105.*)

II.

WHEN THE COMMISSION HELD THAT THE "DEFENDANT LINES" WERE NOT RESPONSIBLE FOR THE LOW RATES BY THE LINE VIA CINCINNATI TO NASHVILLE, THE LOUISVILLE AND NASHVILLE ROAD WAS NOT A DEFENDANT.

Counsel for the carriers quotes in his printed argument filed in this court (p. 64) the statement by the Commission that—

> "The rate by the lines operating through Chattanooga is made by the all-rail carriers via Cincinnati and *their action is uncontrolled by the defendant lines.*"

When the Commission made this finding the Louisville and Nashville road had not appeared as a party defendant. If it had been a party defendant, the Commission could not and would not have made this finding, because it is admitted that the low rates by the line via Cincinnati to Nashville are attributable solely to the Louisville and Nashville Railroad, which, although not a defendant before the Commission, has, as above shown, made itself a party defendant in the case before the court.

It is, therefore, not now true that the rates by the rail line via Cincinnati to Nashville "are uncontrolled by defendant lines."

III.

THE FACT, IF IT BE A FACT, THAT THE LINE VIA CINCINNATI TO NASHVILLE MAY, BY MAINTAINING LOW RATES TO NASHVILLE, DEPRIVE CHATTANOOGA OF ANY BENEFIT UNDER THE ORDER, IS NO GROUND FOR DECLARING THE ORDER UNLAWFUL.

IT IS TO BE PRESUMED THAT THE NATURAL AND PROPER COURSE OF REDUCING THE RATES TO CHATTANOOGA WILL BE ADOPTED.

IF THE LOUISVILLE AND NASHVILLE ROAD SHOULD CONTINUE LOW RATES FROM CINCINNATI TO NASHVILLE, IT WOULD VIOLATE SECTION 3 OF THE LAW, IF IT MAINTAINED HIGHER RATES TO CHATTANOOGA BY THE LINE IT CONTROLS VIA AUGUSTA TO CHATTANOOGA.

It is no ground for declaring the order of the Commission unlawful that in the event it is complied with by advancing the Nashville rates, on the line through Chattanooga, the Louisville and Nashville road may maintain existing rates via Cincinnati to Nashville and thus deprive Chattanooga of all benefit under the order. When that emergency arises it can be looked after.

It is not at all probable that the threat to thus nullify the order of the Commission will be carried out. The "VAST MAJORITY" of the Nashville traffic from the eastern seaboard passes through Chattanooga and thence over the Nashville, Chattanooga and St. Louis Railway to Nashville.

(See transcript of Record, hot. p. 126).

It is not probable that the Nashville, Chattanooga and St. Louis Railway would advance its rates so as to jeopardize its transportation of this traffic, and it is not to be supposed that the Louisville and Nashville road would maintain rates such as would require the former road, which it virtually owns and controls, to sacrifice this traffic. They are one system, and their interests in this traffic are the same.

The Louisville and Nashville road is further interested in the transportation of this traffic through Chattanooga *all the way from Augusta to Nashville.*

If the Louisville and Nashville road should continue low rates to Nashville from Cincinnati, it would violate section 3 of the law in maintaining higher rates to Chattanooga on the line via Augusta to Chattanooga.

IV.

THE ORDER SHOULD BE OBEYED BY REDUCING CHATTANOOGA RATES.

The natural and proper mode of complying with the order is to reduce the Chattanooga rates. The Commission recommends this (see Transcript of Record, p. 54), and if, as we show in our original printed argument, the Chattanooga rates are excessive, this is the only proper mode of compliance with the order.

If the Nashville, Chattanooga and St. Louis road does not advance the Nashville rates it will be incumbent on the *roads terminating at Chattanooga* to reduce the Chattanooga rates. THE RATES TO CHATTANOOGA, IF REDUCED TO THE LEVEL OF THE NASHVILLE RATES, WILL PAY THE ROADS TERMINATING AT CHATTANOOGA A HIGHER RATE ON CHATTANOOGA TRAFFIC THAN THEY NOW RECEIVE ON TRAFFIC TO NASHVILLE. THEY NOW RECEIVE ON TRAFFIC TO NASHVILLE ONLY A PROPORTION OF THE NASHVILLE RATE. THEY WILL THEN RECEIVE THE WHOLE OF THE RATE TO NASHVILLE FOR TRANSPORTATION OF THE TRAFFIC TO CHATTANOOGA.

V.

ALL THE ROADS RESPONSIBLE FOR THE DISCRIMINATION AGAINST CHATTANOOGA IN FAVOR OF NASHVILLE ARE BEFORE THE COURT, NAMELY, THE LINES THROUGH CINCINNATI TO BOTH CHATTANOOGA AND NASHVILLE, AS WELL AS THE LINES THROUGH CHATTANOOGA TO NASHVILLE.

THE LOUISVILLE AND NASHVILLE ROAD DOMINATES AND IS RESPONSIBLE FOR THE SITUATION.

THE THIRD SECTION OF THE ACT APPLIES, IF THE FOURTH DOES NOT.

As we have seen, all the roads responsible for the discrimination in favor of Nashville and against Chattanooga are before the court—both the lines via Cincinnati to Chattanooga and Nashville, as well as the lines through Chattanooga to Nashville.

The difference in rates as between Chattanooga and Nashville commences at Cincinnati, and for this THE LOUISVILLE AND NASHVILLE ROAD IS ALONE RESPONSIBLE.

It is conceded that the Louisville and Nashville road controls not only the only other road that enters Nashville, but the line from Nashville through Chattanooga

and Atlanta all the way to Augusta, which constitutes three-fourths or more of the rail portion of one of the principal routes from the Eastern seaboard by ocean to Savannah and thence by rail to Nashville. *Counsel for the carriers in his oral argument stated that if the Louisville and Nashville controlled the line all the way from Augusta by Savannah to the Eastern seaboard* (as was found by Judge Taft), it might be held responsible in this case. We think its control of the line from Nashville to Augusta makes it equally responsible.

THE THIRD SECTION APPLIES IF THE FOURTH DOES NOT.

Counsel for the carriers admits on page 69 of his printed argument filed in this court that—

"Though the circumstances and conditions at Nashville may be substantially dissimilar from those at Chattanooga, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an undue preference of Nashville, the rates may be declared to be unlawful."
(See printed argument of counsel for carriers, p. 69).

The Louisville and Nashville Company owns absolutely the line from Cincinnati to Nashville, and it controls the line all the way from Augusta through Chattanooga to Nashville, the terminal member of the latter line being the only other road that enters Nashville. It is, as we have shown, solely responsible for the rates by the line via Cincinnati to Nashville, and it has a large influence over the rates on the line from the east-

ern seaboard via Augusta to Chattanooga. IF THIS DOES NOT BRING IT WITHIN THE LETTER OF THE FOURTH SECTION, IT BEYOND DOUBT MAKES THE LOUISVILLE AND NASHVILLE ROAD RESPONSIBLE UNDER THE THIRD SECTION FOR AN UNDUE PREFERENCE OF NASHVILLE.

It is no answer to this to say that the order of the Commission follows the language of the fourth section in forbidding the greater charge for the shorter haul to Chattanooga than for the longer haul to Nashville.

This order will afford relief under section 3 as well as under section 4. It will remove, measurably at least, the undue preference of Nashville and the unjust prejudice to Chattanooga by enabling Chattanooga merchants to compete on equal terms, so far as rates are concerned, with Nashville merchants in territory half way between Chattanooga and Nashville, and will enable Chattanooga to hold the territory immediately tributary to it in all directions so far as Nashville is concerned.

As we have shown in our original printed argument, this court and the circuit courts and the circuit courts of appeals have held that cases like the present are "original and independent proceedings;" that "the court is not the mere executioner of the orders of the Commission;" that the court is invested by Congress with a "LARGE DISCRETION;" that the court "is to do

justice as a court of equity;" and that, in the language of this court in the Alabama Midland Case, the court is "to decide as a court of equity upon the entire body of the evidence, and it is not restricted to a consideration merely of the power of the Commission TO MAKE THE PARTICULAR ORDER IN QUESTION."

I. C. C. *v.* Ala. Mid. Ry. Co., 168 U. S., 175.
Shinkle, Wilson Co. *v.* L. & N. R. R. Co., 62 Fed. Rep., 693.
I. C. C. *v.* C., N. O. & T. P. Ry. Co., 64 Fed. Rep., pp. 984, 985.
I. C. C. *v.* C., N. O. & T. P. Ry. Co., 56 Fed. Rep., 934, 935.
(See original printed argument for appellee, pp. 1 2–164.)

The court having before it all the parties in any way responsible, it is the duty of the court to do justice as a court of equity.

The language of this court in the Alabama Midland Case, quoted above, namely, that "the court is not restricted to a consideration merely of the power of the Commission *to make the particular order in question*," would seem to imply or recognize power in the court to change or modify the order so as to adapt it to the ends of justice.

VI.

NOT NECESSARY TO ADVANCE NASHVILLE RATES OR TO REDUCE CHATTANOOGA RATES TO THE FULL EXTENT OF THE ENTIRE DIFFERENCE BETWEEN THOSE RATES.

We again call attention to the fact, which is commented on in our original printed argument, that counsel for the carriers and his witnesses based their objections to the order in this case on the ground that it requires either an advance of the Nashville rates or a reduction of the Chattanooga rates to the *full extent of the difference* existing between those rates.

That this is an erroneous assumption is clear from the fact that the rates to Chattanooga may be made not higher than those to Nashville by reducing the Chattanooga rates to the extent of one-fourth, one-third, one-half, two-thirds, or other proportion of the difference between the two sets of rates and simultaneously advancing the Nashville rates to the extent of three-fourths, two-thirds, one-half, one-third, or other proportion of that difference.

(See original printed argument for appellee, pp. 82, 83.)

VII.

FORMER POSITION ABANDONED.

NOW CONTENDED THAT THE LOW RATES OF THE LOUISVILLE AND NASHVILLE ROAD FROM CINCINNATI TO NASHVILLE ARE MADE NECESSARY BECAUSE OF THE DUTY OF THAT ROAD TO PROTECT NASHVILLE.

In the answers of the defendants filed in this case, and heretofore in the argument of counsel, it was claimed that the low rates of the Louisville and Nashville road from Cincinnati to Nashville were forced upon that road by river competition of the Ohio and Cumberland rivers from Cincinnati or Evansville to Nashville. Counsel for the carriers announced before the court in his oral argument that this position was no longer relied upon. The contention now is that these low rates result, not from river competition, but from the fact that the Louisville and Nashville road was compelled to extend cheap trunk-line rates from Cincinnati to Nashville *in order to protect Nashville in her competition with the Ohio River points—Cincinnati, Louisville, and Evansville to the north and west of her.*

If this be the right and duty of the Louisville and Nashville road, it is equally the duty of the Cincinnati, New Orleans and Texas Pacific road to extend cheap trunk-line rates from Cincinnati *to Chattanooga, in order to protect Chattanooga in her competition with Nashville in territory to the northwest of Chattanooga.*

VIII.

MOTIVE OF THE DISCRIMNATION AGAINST CHATTANOOGA IN FAVOR OF NASHVILLE.

The Louisville and Nashville road, having control of the only other road that enters Nashville, *has a practical monopoly of the transportation business to and from Nashville.* This business amounts to a great deal, Nashville being now a city of about 100,000 inhabitants. Hence, counsel for carriers stated in his printed arguments filed in the circuit court and the circuit court of appeals, "THE LOUISVILLE AND NASHVILLE ROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE."

This, we believe, to be the motive of the discrimination in favor of Nashville against Chattanooga.